87-1524

No.

In the Supreme Court of the United States

October Term, 1987

HONEYWELL, INC. and ECLIPSE, INC.,
Petitioners,

v.

BETTY JANE LUZADDER, Executrix of the Estate of DAVID P. LUZADDER, Deceased; and DESPATCH OVEN COMPANY,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petition For A Writ Of Certiorari

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QUESTION PRESENTED FOR REVIEW

Whether, in a diversity case arising under Pennsylvania law, the Court of Appeals for the Third Circuit is free to disregard and controvert Pennsylvania common law as announced in decisions of Pennsylvania's intermediate appellate court?

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REFERENCE TO REPORTS OF DECISIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit is published at 834 F.2d 355 (3d Cir. 1987). That of the United States District Court for the Western District of Pennsylvania is published at 651 F. Supp. 239 (W.D. Pa. 1986). Both opinions are set forth verbatim in the appendix.

STATEMENT OF JURISDICTION

The decision to be reviewed was entered by the United States Court of Appeals for the Third Circuit on November 27, 1987. That court denied a timely petition for rehearing on December 18, 1987. This Court has jurisdiction to review the judgment by writ of certiorari pursuant to 28 U.S.C. §§ 1254(1), 2101(c).

The United States District Court for the Western District of Pennsylvania had jurisdiction pursuant to 28 U.S.C. § 1341 (diversity of citizenship and amount in controversy). The United States Court of Appeals for the Third Circuit had jurisdiction pursuant to 28 U.S.C. § 1292 (appeals of final orders).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The following constitutional provisions and statutes, involved in this appeal, are set forth verbatim in the appendix to this petition:

U.S. Const., article IV, section 1
U.S. Const., amendment 10
28 U.S.C. § 1652
28 U.S.C. § 1738
42 Pa.C.S.A. § 726

42 Pa.C.S.A. § 742
42 Pa.C.S.A. § 5536

STATEMENT OF THE CASE

This products liability case arises from a December 2, 1980 explosion of a large, gas-fired furnace used in a glass molding operation. The oven was sold and installed in March of 1965. It allegedly contained component parts manufactured by Eclipse, Inc. and Honeywell, Inc. The component part manufacturers raised, as an affirmative defense, Pennsylvania's twelve-year statute of repose for improvements to real property, 42 Pa.C.S.A. § 5536, and presented this issue via a joint motion for summary judgment. Following the Pennsylvania Superior Court's lead, the District Court granted summary judgment on the basis that the statute of repose indeed applied to manufacturers of component parts for large industrial equipment. *Luzzader v. Despatch Oven Co.*, 651 F. Supp. 239, 244-45 (W.D. Pa. 1986). A divided panel reversed, however, concluding that manufacturers were excluded from the protection of the statute of repose and that it was not bound to follow the prior intermediate appellate court decisions. *Luzzader v. Despatch Oven Co.*, 834 F.2d 355, 356 (3d Cir. 1987). Thereafter, the Court of Appeals denied a timely petition for rehearing wherein the court was asked to defer to the Superior Court decisions as applicable state law pursuant to *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938). This petition for a writ of certiorari followed.

ARGUMENT

THE WRIT SHOULD BE ISSUED BECAUSE THE COURT OF APPEALS' DECISION, DISREGARDING APPLICABLE STATE SUBSTANTIVE LAW SIMPLY BECAUSE IT EMANATED FROM AN INTERMEDIATE APPELLATE COURT, DECIDED A QUESTION OF FEDERAL LAW IN A WAY CONFLICTING WITH APPLICABLE DECISIONS OF THIS COURT.

The narrow issue in this case concerns the degree of deference to be given in a diversity case to a decision of the Pennsylvania Superior Court, an intermediate appellate court of state-wide jurisdiction. On at least three previous occasions, in order to preserve the autonomy of the state judiciary and integrity of state intermediate appellate decisions, this Court held that it was error for a circuit Court to disregard a state intermediate appellate decision absent more convincing evidence of the state's law. *Fidelity Union Trust Co. v. Field*, 311 U.S. 169 (1940); *Six Companies of California v. Joint Highway Dist. No. 13 of California*, 311 U.S. 180 (1940); *West v. American Telephone & Telegraph Co.*, 311 U.S. 223 (1940). In freely disregarding applicable decisions of the Pennsylvania Superior Court, the Third Circuit in this case decided an important federal question in a manner contrary to the views of this Court.

In *Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 71 (1938), this Court granted certiorari "[b]ecause of the importance of the question whether the federal court was free to disregard the alleged rule of Pennsylvania common law." *Erie* held that the rules of decision in a diversity case are state rules "[a]nd whether the law of the state shall be declared by its Legislature in a statute or by its highest

court in a decision is not a matter of federal concern." *Id.* at 78. *See also* 28 U.S.C. § 1652. The Court reached those conclusions because federal courts could not constitutionally invade the province of the states to declare the state's substantive law by statute or decision, *id.* at 78-80, and to allow such a system to continue could make the choice of forum determinative of the outcome of any diversity case, *id.* at 74-78. Although the issue before the Court in *Erie* was limited to the precedential effect of a decision of the Pennsylvania Supreme Court—the highest state appellate court—the considerations which justified this Court's review of that issue and which ultimately weighed in favor of the sanctity of state judicial decisions are equally apropos in the context of a state intermediate appellate court opinion.

Indeed, two years later, this Court so ruled in *West, Six Companies* and *Fidelity Union*. For example, the Court in *Fidelity Union* held:

> An intermediate state court in declaring and applying the state law is acting as an organ of the State and its determination, in the absence of more convincing evidence of what state law is, should be followed by a federal court in deciding a state question. We have declared that principle in *West* . . . , decided this day. It is true that in that case an intermediate appellate court of the State had determined the immediate question as between the same parties in a prior suit, and the highest state court had refused to review the lower court's decision, but we set forth the broader principle as applicable to the decision of an intermediate court, in the absence of a decision by the highest court, whether the question is one of statute or common law.

311 U.S. at 177-78. *See also West*, 311 U.S. at 236-37; *Six Companies*, 311 U.S. at 188. The Court expressed disdain for the two divergent or conflicting legal systems which could evolve were federal courts free to disregard state intermediate decisions. *West*, 311 U.S. at 236-37; *Fidelity Union*, 311 U.S. at 179-80. Thus, it unmistakably held that a federal court could not disregard a state intermediate decision simply because it did not agree with the state court's reasoning, *Fidelity Union*, 311 U.S. at 179; *Six Companies*, 311 U.S. at 188, nor "even though it may think that the state Supreme Court may establish a different rule in some future litigation," *West*, 311 U.S. at 238. Thus, because the balance of state and federal interests is not significantly different when one considers the source of state law to be an intermediate appellate court, our federal judges may not freely reach a contrary decision in the guise of predicting how the state's highest court would rule.

The Third Circuit's cavalier approach to Pennsylvania law is contrary to *West, Fidelity Union* and *Six Companies* because the Court articulated no compelling basis to disregard the Superior Court's pronouncement of state law. In *Catanzaro v. Wasco Products, Inc.*, 339 Pa. Super. 481, 486-87, 489 A.2d 262, 265 (1985); and *Mitchell v. United Elevator Co.*, 290 Pa. Super. 476, 488, 434 A.2d 1243, 1249 (1981), the Superior Court unequivocally and unanimously applied the statute of repose to manufacturers of component parts. Yet, drawing upon the same sources as did the Pennsylvania Superior Court, the Third Circuit ruled that the statute did not apply. 834 F.2d at 358. Thus, the panel majority is squarely at odds with the only Pennsylvania precedents concerning the application of the stat-

ute of repose. As a result, the choice of forum will be determinative of the outcome of this case, contrary to the spirit of *Erie*. There is no doubt that a Pennsylvania trial judge and any subsequent Pennsylvania Superior Court panel would be constrained to follow *Catanzaro* and *Mitchell*. However, a federal judge would be inclined to follow—if not be bound by—this panel's decision. Intermediate appellate decisions should not be disregarded or emasculated absent weighty and demonstrable considerations. Because the panel majority sets forth no compelling reason to reach a conclusion contrary to that expressed by the Pennsylvania Superior Court, this case cannot be reconciled with *Fidelity Union, West* and *Six Companies*.

The federal courts ought to follow Superior Court decisions. The Superior Court of Pennsylvania is a state-wide intermediate appellate court of general jurisdiction.[1] 42 Pa.C.S.A. § 742. Because the Pennsylvania Supreme Court now exercises discretionary appellate review, 42 Pa.C.S.A. § 726, the Superior Court has, for all intents and purposes, become a court of last resort. Pennsylvania trial judges are bound by its decisions and Superior Court decisions would be given full faith and credit in any sister state, U.S. Const., article IV, section 1; 28 U.S.C. § 1738. Yet, the Third Circuit, when purporting to apply state law, freely disregarded two Superior Court decisions. While the role of a federal judge, under *Erie*, is to predict what the state's highest court would hold on a given issue, the rule was

[1]The Commonwealth Court of Pennsylvania is also a state-wide intermediate appellate court, albeit one of limited subject matter jurisdiction. *See* 42 Pa.C.S.A. § 762.

intended to prevent situations in which the choice of forum would determine the outcome of a case. However, by giving the federal judiciary the power to ignore an intermediate appellate court's decision binding in every state court in the union, an opposite result occurs. That is why this Court decided *Fidelity Union, West* and *Six Companies* and why it must now reverse the Third Circuit.

A federal court's unsubstantiated disregard of a decision which would be binding in the state courts fosters anomalous results which occur solely because of the choice of forum. Such a result was not intended by the full-faith and credit clause nor by *Erie* and its progeny. Nor can such a result be squared with the tenth amendment, the equal protection clause and the rules of decision act. Therefore, the writ of certiorari should be issued, the decision of the United States Court of Appeals for the Third Circuit should be reversed and that of the United States District Court for the Western District of Pennsylvania should be reinstated.

CONCLUSION

Novel and controversial issues of state law should not be resolved by a divided federal appellate tribunal in a manner inconsistent with the settled pronouncements of the Pennsylvania intermediate appellate court. Because the panel majority declined to follow state court precedent, review by this Court is warranted. Therefore, the writ of certiorari should be issued, the order of the Court of Appeals should be reversed and the judgment of the District Court should be reinstated.

Respectfully submitted,

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United States Court of Appeals

FOR THE THIRD CIRCUIT

Nos. 87-3030 and 87-3142

BETTY JANE LUZZADER, Executrix of the Estate of David P. Luzzader, Deceased

v.

DESPATCH OVEN COMPANY and ECLIPSE, INC.

v.

BROCKWAY, INC., a corporation; HONEYWELL, INC.
Betty Jane Luzzader, *Appellant*

Appeal From the United States District Court For the Western District of Pennsylvania (Pittsburgh)
D.C. Civil No. 81-2145

Argued
September 10, 1987

Before: SLOVITER, STAPLETON, *Circuit Judges,* and BROTMAN,* *District Judge*

Opinion filed November 27, 1987

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OPINION OF THE COURT

BROTMAN, *District Judge:*

The present appeal calls upon this court to interpret a Pennsylvania statute of repose, 42 Pa. Cons. Stat. Ann. § 5536 (Purdon 1981), which extinguishes certain actions arising out of defects in improvements made to real property not commenced within twelve years of the making of such improvements. The district court below granted summary judgment in favor of appellees Despatch Oven Company, Eclipse, Inc., and Honeywell, Inc., determining that plaintiff's claim was barred by § 5536. Because we conclude that these defendant manufacturers do not fall

within the class of persons sought to be protected by Pennsylvania's repose statute, we reverse the district court's grant of summary judgment.

I.

This action arises out of an accident which occurred on December 2, 1980 at the Brockway Plant, owned by Brockway Glass Company ("Brockway"), in Washington, Pennsylvania. Appellant's husband, David Luzzader, was injured when a natural gas fired furnace ("the oven") exploded. This oven was manufactured by Despatch Oven Company ("Despatch") and contained component parts manufactured by co-defendant Eclipse, Inc. ("Eclipse") and third-party defendant Honeywell, Inc. ("Honeywell"). The oven was sold to Brockway in March, 1965 and Brockway installed it for use in its glass molding operation.

As a result of the December, 1980 accident, appellant's husband suffered severe injuries. Appellant and her husband filed suit against Despatch and Eclipse in December, 1981. In May, 1982, appellant's husband committed suicide. Appellant amended her complaint to include a wrongful death claim, alleging that her husband's suicide was the result of a post-traumatic syndrome.

Eclipse filed a third-party complaint against Honeywell in June, 1983. Honeywell filed a crossclaim against Eclipse. Plaintiff asserted no claim against Honeywell.

Motions for summary judgment, Fed. R. Civ. P. 56, on the basis of Pennsylvania's Statute of Repose, 42 Pa. Cons. Stat. Ann. § 5536, were filed by Despatch, Eclipse and Honeywell on February 4, 1986. These motions were granted in December, 1986. Appellant then moved for sanctions under Fed. R. Civ. P. 11 against Despatch and

Eclipse, claiming that these parties should have raised the § 5536 defense earlier in the proceedings. Eclipse had raised this defense in its answer while § 5536 had not been raised by Despatch in its pleadings. The motion for sanctions was denied. Appellant then filed this appeal, challenging both the grant of summary judgment and the denial of sanctions.[1]

II.

(A) *Whether 42 Pa. Cons. Stat. Ann. § 5536 is a Statute of Limitations or a Statute of Repose?*

Appellant argues that § 5536[2] is a waivable statute of limitations, and not a non-waivable statute of repose.

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[1]Third-party defendant Honeywell argues that Eclipse, the only party to assert a claim against Honeywell, did not file a cross-appeal in this action and therefore Honeywell must be dismissed from this lawsuit regardless of how this appeal is resolved. The court must reject this argument.

The granting by the district court of summary judgment in favor of Eclipse a fortiori required the granting of summary judgment on the third-party complaint against Honeywell. Firstly, § 5536, when applicable, applies with equal force to third-party claims for contributions and indemnification. 42 Pa. Cons. Stat. Ann. § 5536(a)(4). Secondly, in the absence of liability on Eclipse's part to the plaintiff, Honeywell owes no duty of contribution or indemnification to Eclipse. Therefore, to require Eclipse to preserve its contingent rights against Honeywell by filing a cross-appeal, the only possible grounds for which would be that the district court erred in finding Eclipse not liable to the plaintiff, would elevate form over substance and lead to an unjust result.

[2]Section 5536 in pertinent part states:

(a) **General rule.**—Except as provided in subsection (b), a civil action or proceeding brought against any person lawfully performing or furnishing the design, planning, supervision or observation of construction, or construction of any improvement to real property must be commenced within 12 years after completion of construction of such improvement to recover damages for:

(Continued on next page)

Thus, appellant urges, appellee Despatch waived any defense provided by § 5536 by not raising it in its pleadings.

Section 5536, which went into effect in 1978, is a substantial reenactment of Pa. Cons. Stat. Ann. tit. 12, § 65.1 (repealed).[3] Nonetheless, while the substance of the provisions appears to have remained the same, the legislature did modify the language of § 65.1 in enacting § 5536.

The limiting language of § 65.1 reads "no action . . . shall be brought . . . more than twelve years after completion of such an improvement" while the parallel

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(Continued)

(1) Any deficiency in the design, planning, supervision or observation of construction or construction of the improvement.

(2) Injury to property, real or personal, arising out of any such deficiency.

(3) Injury to the person or for wrongful death arising out of any such deficiency.

(4) Contribution or indemnity for damages sustained on account of any injury mentioned in paragraph (2) or (3).

[3]Section 65.1 (repealed) states:

No action (including proceedings) whether in contract, in tort or otherwise, to recover damages:

(1) For any deficiency in the design, planning, supervision or observation of construction or construction of an improvement to real property,

(2) For injury to property, real or personal, arising out of any such deficiency,

(3) For injury to the person or for wrongful death arising out of any such deficiency, or

(4) For contribution or indemnity for damages sustained on account of any injury mentioned in clauses (2) and (3) hereof shall be brought against any person lawfully performing or furnishing the design, planning, supervision or observation of construction, or construction of such improvement more than twelve years after completion of such an improvement.

language of § 5536 is "a civil action . . . must be commenced within twelve years after completion of construction of such improvement." Appellant concedes that the predecessor statute, § 65.1, was a non-waivable statute of repose. Appellant, however, points to the changes in statutory language in arguing that § 5536 is a waivable statute of limitations.

Initially, it should be noted that, while the Pennsylvania Supreme Court has yet to characterize § 5536 as either a statute of limitations or a statute of repose, the weight of precedent in Pennsylvania's lower courts goes decidedly against appellant's interpretation. *See Fetterhoff v. Fetterhoff*, 512 A.2d 30, 32 (Pa. Super. 1986) ("Since this [§ 5536] is a statute of repose, the liability is extinguished upon passage of the twelve years and it is a non-waivable right, contrary to a statute of limitations, which is waived, if not alleged, in a responsive pleading."); *Catanzaro v. Wasco Products, Inc.*, 489 A.2d 262, 264 (Pa. Super. 1985); *Mitchell v. United Elevator Co., Inc.*, 434 A.2d 1243 (Pa. Super. 1981). In fact, appellant cites no Pennsylvania caselaw which supports her position. Furthermore, federal district courts which have interpreted this provision have unquestioningly held that § 5536 is a statute of repose. *Springman v. Wire Machinery Corporation of America*, 666 F. Supp. 66, 67 (M.D. Pa. 1987); *Vasquez v. Whiting Corporation*, 660 F. Supp. 685, 686 (E.D. Pa. 1987); *Facenda v. Applied Powers, Inc.*, No. 87-0980, slip op. (E.D. Pa. July 17, 1987); *Gnall v. Illinois Water Treatment Co.*, 640 F. Supp. 815, 817 (M.D. Pa. May 18, 1983).

Above and beyond the weight of this authority, we find plaintiff's argument unpersuasive. That the Pennsylvania Legislature would make such a substantial change in the nature and effect of this statute through a seemingly

inconsequential alteration of its language, and in the absence of any legislative debate,[4] is a conclusion which is not easily, nor do we believe, prudently reached.

Additionaly, § 5536, which bars actions not brought within twelve years of the making of the improvement to real property, is drafted not as a statute of limitations but as a statute of repose. Statutes or repose, unlike most statutes of limitations, start to run, as does § 5536, at the completion of certain conduct by the defendant. Whereas a claim under a statute of limitations accrues when a plaintiff either suffers or discovers the harm complained of, "[s]tatutes of repose by their nature []impose on some plaintiffs the hardship of having a claim extinguished before it is discovered, or perhaps before it even exists . . . " W. Keeton, *Prosser and Keeton on Torts* § 30, p. 168 (5th Edition 1984). Such is the function of § 5536.

Therefore, § 5536 being a statute of repose, plaintiff's claim against Despatch, if the statute applied to that claim, was extinguished in 1977—twelve years after the Despatch oven was installed at the Brockway plant and four years before this suit was filed. Despatch's failure to raise the § 5536 defense in its answer would not revive this claim.

The court must next determine whether § 5536 applies to the claims asserted by plaintiff. In order for § 5536 to be applicable, it must be found (1) that appellees are within the class of persons protected by statute; and (2) that the

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[4]As noted in section II, (B) of this opinion, § 5536 was enacted without legislative debate.

products manufactured by appellees are improvements to real property within the meaning of § 5536.[5]

(B) *Whether Defendants Are Within the Class of Persons Protected by Section 5536.*

The district court, after determining that the oven was an improvement to real property, concluded that § 5536 applied to Despatch as the manufacturer of the oven and to Eclipse and Honeywell as manufacturers of component parts of the oven. A conflicting result, however, has been reached by two other district courts in opinions issued after the district court rendered its decision in this case. These later cases held that § 5536 does not bar actions against a manufacturer who plays no role in the installation of a product. *Vasquez v. Whiting Corp.*, 660 F. Supp. 685 (E.D. Pa. 1987) (Cahn, J.); *Springman v. Wire Machinery Corp. of America*, 666 F. Supp. 66 (M.D. Pa. 1987) (Muir. J.).[6]

On the other hand, recent Pennsylvania Superior Court decisions have given a more expansive interpretation to § 5536. *See, e.g., Catanzaro*, 489 A.2d 262 (Pa. Super. 1985) (manufacturer of skydome protected under repose statute); *Mitchell*, 434 A.2d 1243 (Pa. Super. 1981)

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[5]Because we hold that none of the defendant manufacturers are within the class of defendants § 5536 seeks to protect, we need not reach the question of whether the products manufactured by appellees constitute improvements to real property.

[6]Judge Muir had reached the same conclusion in an earlier case, *Kovach v. The Crane Company*, No. 82-0530, slip op. (M.D. Pa. May 18, 1983), where he held § 5536 inapplicable to the manufacturer of a boiler.

(manufacturer of elevator system protected by § 5536).[7] However, as with the issue of what constitutes an improvement under § 5536, the Pennsylvania Supreme Court has yet to speak on the scope of coverage of § 5536. In the absence of such a pronouncement, a federal court sitting in diversity must predict how the Supreme Court would decide the issue. *McGowan v. University of Scranton*, 759 F.2d 287, 291 (3d Cir. 1985). In so predicting, decisions from a state intermediate appellate court become "presumptive evidence, rather than absolute pronouncement of state law." *National Surety Corp. v. Midland Bank*, 551 F.2d 12, 30 (3d Cir. 1977).

In first looking at the language of § 5536, it is evident that manufacturers are not covered under the plain meaning of the statute. Section 5536 speaks in terms of "any person lawfully performing or furnishing the design, planning, supervision or observation of construction, or construction of any improvement to real property. . . ." Nowhere does the statute speak of the manufacture of an improvement.

Judge Muir noted in *Springman* that "[t]he history of [§ 5536] reveals that the statute was passed as a result of

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[7]In addition to these Superior Court decisions, Judge Cohill is not the only federal district judge sitting in Pennsylvania who has applied § 5536 to manufacturers. *See Facenda v. Applied Powers, Inc.*, No. 87-0980, slip op. (E.D. Pa. July 17, 1987) (Newcomer, J.) (applying statute of repose to manufacturer of automobile body frame repair system); *Gnall v. Illinois Water Treatment Co.*, 640 F. Supp. 815 (M.D. Pa. 1986) (Conaboy, J.) (applying statute of repose to manufacturer of tanks used as part of water treatment system). In *Gnall*, Judge Conaboy discussed Judge Muir's 1983 *Kovach* decision at length, and suggested that, had Judge Muir the benefit of reading the Superior Court's decision in *Catanzaro* when he wrote the opinion in *Kovach*, Judge Muir "may well have come to a different result," *Id.* at 821. This proved not to be the case as evidenced by Judge Muir's decision in *Springman*.

the lobbying efforts of the American Institute of Architects, the National Society of Professional Engineers, and the Associated General Contractors of America and meant to protect these groups of people—not manufacturers." 666 F. Sup. at 69. *See also, The Variety, Policy and Constitutionality of Product Liability Statutes of Repose*, 30 Am. U. L. Rev. 579, 587 (1981); *Limitation of Action Statutes for Architects and Builders—Blueprints for Non-Action*, 18 Cath. U. L. Rev. 361, 365 (1969).[8]

We believe that manufacturers have, for good reason, been excluded from the protection of Pennsylvania's statute of repose. Application of § 5536 to manufacturers would cut the heart out of Pennsylvania's product liability law, by immunizing any manufacturing company fortunate enough to have its product turned into an improvement to real property. As Judge Cahn explained in *Vasquez*,

> The policy underlying § 402A of the Restatement (Second) of Torts (1965), which has been adopted as the law of Pennsylvania, . . . , is to protect and compensate victims of defective products while forcing suppliers of such products to bear the risk of loss. . . . These policies would be undermined if manufacturers of products were able to claim that the statute of repose

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[8]Furthermore, in *Vasquez*, Judge Cahn cites some legislative history of the predecessor statute to § 5536, (there is no such history for § 5536 itself), which supports Judge Muir's interpretation. One Mr. Mebus, in speaking in support of the statute, stated that it would "provide[] for protection from accusations of professional failure long after his engagement is complete." 660 F. Supp. at 688 n.3. A Mr. Sesher, speaking in opposition to the bill, stated, "I have never been under the impression that undue harassment has occurred to contractors, architects or designers, so as to necessitate this type of legislation. . . ." *Id.*

> relieves them of liability merely because their products have somehow become "improvements to real property."

Id. at 689.[9]

To expand the scope of the repose statute to cover manufacturers would also work to draw an artificial distinction between manufacturers of different products, creating a situation where the maker of a furnace would be protected by the provisions of § 5536, while the maker of an automobile would not be. No policy or reason can be cited to justify such incongruity. In fact, the arbitrariness of such a distinction has been recognized by the Pennsylvania Supreme Court, albeit in a different context than the one presented.

In *Foley v. Pittsburgh-Des Moines Co.*, 68 A.2d 517 (1954), the Pennsylvania Supreme Court discussed the seminal case of *MacPherson v. Buick Motor Co.*, 217 N.Y. 382 (1916), in which New York Court of Appeals held that a manufacturer owes a duty of reasonable care to third persons, even though there exists no contract between them, and that therefore the manufacturer is liable in tort to such persons for injuries caused by the manufacturer's defective products. *Id.* This principle formed the basis for modern-day products liability law.

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[9]The Pennsylvania Supreme Court offered, in dicta, a persuasive rationale for distinguishing between professional builders and designers and manufacturing companies for purposes of products liability law. "Suppliers who typically produce items by the thousands, can easily maintain high quality control standards in the controlled environment of the factory. A builder, on the other hand, can pre-test his design and construction only in limited ways—actual use in the years following construction is their only real test. . . ." *Freezer Storage, Inc. v. Armstrong Cork Co.*, 382 A.2d 715, 719 (1978).

In *Foley*, the Pennsylvania Supreme Court applied this principle of tort law to improvements to real property, rejecting the argument that *MacPherson* should only be applied to chattels.

> There is no logical basis for such a distinction, and it would obviously be absurd to hold that a manufacturer would be liable if negligent in building a small, readily movable tank which would undoubtedly be a chattel, but not in building an enormously large and correspondingly more potentially dangerous a one that legalistically was classified as realty. The principle inherent in the *MacPherson v. Buick Motor Co.* case and those that have followed it is that one who manufactures and delivers any article or structure with the knowledge that it will be subject to use by others, must, for the protection of human life and property, use proper care to make it reasonably safe for such users and for those who may come into its vicinity; certainly the application of that principle cannot be made to depend upon the merely technical distinction between a chattel and a structure built upon the land.

68 A.2d at 533.

As this court has previously noted, changes in a state's "basic tort law should emanate from the Pennsylvania Supreme Court and not the Superior Court." *Vargus v. Pitman Manufacturing Co.*, 675 F.2d 73, 76 (3d Cir. 1982). While we recognize that several of the district courts have suggested that the Supreme Court of Pennsylvania will follow the apparrent trend developing in the lower courts of that state which would extend the scope of the statute of repose to cover manufacturers of improvments to real property, we are compelled to disagree. Therefore, the order of the district court granting summary judgment for defendants will be reversed.

III.

Appellant seeks sanctions against Despatch and Eclipse for their failure to raise the § 5536 defense sooner. Eclipse raised the defense in its answer. Despatch did not. The district court found no violation of Fed. R. Civ. P. 11 by either appellee.

Review of the denial of a motion for sanctions is subject to the abuse of discretion standard. *Eavenson, Auchmuty & Greenwald v. Holtzman*, 775 F.2d 535, 540 (1985). There is no indication of such an abuse of discretion in the record.

Appellant argues that Despatch and Eclipse sat on their rights, and went through hundreds of hours and pages of discovery, solely to increase costs to appellant and to harass her. This argument is untenable. Clearly, the applicability of the statute of repose in this type of action is far from being a well-settled area of the law. Despatch and Eclipse cannot be said to have been objectively unreasonable in not raising § 5536 as a defense earlier than they did. Thus, the district court's denial of sanctions should be affirmed.

STAPLETON, *Circuit Judge*, dissenting.

Finding the Superior Court's consistent reading of Section 5536 consistent both with its text and all cited precedent of the Supreme Court of Pennsylvania, I feel constrained by *Erie* and its progeny to hold that a manufacturer and designer of an oven intended for incorporation into the structure of a glass molding plant is protected by statute. Since I agree with my colleagues that Section 5536 is a statute of repose and that the district judge did not abuse his discretion in denying sanctions, I would

affirm the district court with respect to the claims against Despatch.

Given the rationale of the Superior Court in *Catanzaro v. Wasco Products, Inc.*, 489 A.2d 262 (Pa. Super. 1985) and *Mitchell v. United Elevator Co., Inc.*, 434 A.2d 1243 (Pa. Super. 1981), I believe the disposition of the claims against Eclipse and Honeywell should turn upon whether their component parts were specifically designed for this purpose or were shelf items intended for many purposes and used here only because of a choice by Despatch, an issue that it would serve no purpose to pursue further here.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

BETTY JANE LUZZADER,
Executrix of the Estate of
David P. Luzzader, Deceased,
Plaintiff,
v.
DESPATCH OVEN COMPANY
and ECLIPSE, INC.,
Defendants,
v.
HONEYWELL, INC.,
Third-Party Defendant.

Civil Action
No. 81-2145

OPINION

COHILL, C. J.

Plaintiff, Betty Jane Luzzader, brought this diversity action against defendants, Despatch Oven Company ("Despatch") and Eclipse, Inc. ("Eclipse"), based on theories of strict liability, intentional tort, negligence, breach of warranty and loss of consortium for the wrongful death of her husband, David P. Luzzader. Plaintiff's decedent was seriously injured when a heat-treating oven exploded at the Brockway Glass Company ("Brockway") in Washington, Pennsylvania, where he was employed. The oven, a large, natural gas-fired furnace, was used to heat molds which are installed in glass bottle-making machines. It was designed and manufactured by Despatch and sold to Brockway in March of 1965. The oven contained an atmospheric box burner, manufactured by Eclipse, which regulated the supply of gas that entered the oven-burning chamber. It also

contained a protectorelay or combustion safegard, manufactured by Honeywell, Inc. ("Honeywell"), which constituted part of a safety system intended to prevent explosions caused by improper or unsafe oven operation. The Despatch oven was connected to the Brockway plant's system of ductwork to provide for fresh air intake and exhaust. Deposition of Robert Jung at 20-21. Since the oven was gas-fired, it was also connected to the plant's gas pipeline system. Deposition of Gregory Allen Bushko at 28.

The oven exploded on December 2, 1980 while Mr. Luzzader, a foreman at Brockway, was checking it. Plaintiff alleges that the oven exploded because the "spud" which was screwed into the atmospheric burner box became unthreaded and fell out, permitting an explosive amount of gas to enter the oven. On May 1, 1982, Mr. Luzzader committed suicide, allegedly because of the intolerable injuries he sustained in the explosion.

This action was filed on December 1, 1981. Thereafter, defendants Despatch and Eclipse filed cross-claims against each other for indemnification and/or contribution. Defendant Eclipse also filed a third-party complaint against Honeywell for indemnification and/or contribution in the event that Eclipse was found liable. Honeywell, in turn, filed a similar third-party cross-claim against Despatch. Collectively, the defendants have moved for summary judgment on the grounds that plaintiff's claim is barred by Pennsylvania's 12-year statute of repose, 42 Pa. C.S. § 5536 which provides, in pertinent part, as follows:

§ 5536. Construction projects

(a) General rule.— . . . a civil action or proceeding brought against any person lawfully performing or furnishing the design, planning, supervision or observation of construction, or construction of any improvement to real property must be commenced within 12 years after completion of construction of such improvement to recover damages for:

(1) Any deficiency in the design, planning, supervision or observation of construction or construction of the improvement.

(2) Injury to property, real or personal, arising out of any such deficiency.

(3) Injury to the person or for wrongful death arising out of such deficiency.

(4) Contribution or indemnity for damages sustained on account of any injury mentioned in paragraph (2) or (3).

. . .

(c) No extention of limitations.—This section shall not extend the period within which any civil action or proceeding may be commenced under any provision of law.

Here, the Despatch oven was incorporated into the Brockway plant more than 15 years before the accident occurred. Thus, the undisputed chronology of events leading to this litigation is such that if § 5536 is applicable, plaintiff's claim is time-barred.

We find that § 5536 does insulate all of these defendants from plaintiff's claims, and summary judgment will be entered in their favor.

Plaintiff argues that this statute does not apply because (1) it is a statute of limitations which was waived by the defendants; (2) the oven did not constitute an "improvement to real estate" within the meaning of § 5536; and (3) defendants Eclipse and Honeywell are manufacturers of component parts marketed for general use and, thus, are not insulated from liability under § 5536.

Summary Judgment

When considering a motion for summary judgment, the Court must determine whether the pleadings, depositions, affidavits, answers to interrogatories, and admissions on file, when viewed in the light most favorable to the non-moving party, present a genuine issue as to any material fact. If not, the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). The materiality of a disputed fact is determined by looking to the substantive law of the case. Disputes over facts which will not affect the outcome of the case do not preclude summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202, 211 (1986).

The moving party bears the burden of proving that no genuine issue exists. *Andickes v. Kress & Co.*, 398 U.S. 144, 90 S.Ct. 1598, 26 L.Ed.2d 142 (1970). However, this burden can be discharged by merely pointing out the "absence of evidence to support the non-moving party's case." *Celotex Corp. v. Catrett*, 477 U.S. 377, 106 S.Ct. 2548, 91 L.Ed.2d 265, 275 (1986). Once the moving party has met that burden, it becomes incumbent upon the non-moving party "to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." 477 U.S. at ___, 106 S.Ct. at ___, 91 L.Ed.2d at 273. Any

doubts must be resolved in favor of the non-moving party. *Gans v. Mundy*, 762 F.2d 338, 341 (3d Cir. 1985) (quoting *Ness v. Marshall*, 660 F.2d 517, 519 (3d Cir. 1981)).

DISCUSSION

I. Background

The predecessor statute to § 5536, 12 Pa.C.S.A. § 65.1 (repealed), like similar legislation in a majority of states, was enacted in the late 1960's as a result of the concerted lobbying efforts of the American Institute of Architects, the National Society of Professional Engineers, and the Associated General Contractors of America. *See, e.g., Gnall v. Illinois Water Treatment Co.*, 640 F.Supp. 815, 819 n.6 (M.D. Pa. 1986); *Jackson v. Mannesmann Demag Corporation*, 435 So.2d 725 (Ala. 1983); *Tabler v. Wallace*, 704 S.W. 2d 179 (Ky. 1985). *See generally*, Comment, *Limitation of Action Statutes for Architects and Builders—Blueprints for Non-action*, 18 Cath. U.L. Rev. 361 (1969). The statute was designed to protect architects, engineers, and contractors from exposure to delayed liability; that is, openness to legal claims long after they had completed "improvements to real property," which often have long life expectancies. *Freezer Storage, Inc. v. Armstrong Cork Co.*, 476 Pa. 270, 283, 382 A.2d 715, 722 (1978) (Manderino, J., dissenting). The legislation is intended to cut off liability at the point when a contractor, architect or engineer would be unfairly prejudiced in attempting to assert a defense to charges of defective design or construction. *Id.*; *Patraka v. Armco Steel Co.*, 495 F.Supp 1013, 1019 (M.D. Pa. 1980).

II. 42 Pa.C.S.A. § 5536 Is a Non-Waivable Statute of Repose

It is well settled that 42 Pa.C.S.A. § 5536 is a non-waivable statute of repose which completely abolishes any personal injury cause of action arising out of deficiency in the design, planning, supervision of construction, or construction of improvements to realty after the expiration of 12 years following completion of the improvement. *Catanzaro v. Wasco Products, Inc.*, 339 Pa. Super. 481, 484, 489 A.2d 262, 264 (1985); *Mitchell v. United Elevator Co.*, 290 Pa. Super 476, 483, 434 A.2d 1243, 1249 (1981). Recently, the Pennsylvania Superior Court laid to rest any contention that § 5536 is waivable when it stated: "[s]ince this is a statute of repose, the liability is extinguished upon passage of the twelve years and it is a non-waivable right, contrary to a statute of limitations, which is waived, if not alleged, in a responsive pleading." *Fetterhoff v. Fetterhoff*, 354 Pa. Super. 438, 512 A.2d 30, 32 (1986) (citing *Mitchell*).

Unlike a statute of limitations, the instant statute of repose erects a bar to lawsuits even before a cause of action may have accrued; thus it can be raised as a defense at any point in the case. *Patraka*, 495 F.Supp. at 1019; *Mitchell*, 290 Pa. Super. at 487, 434 A.2d at 1249. Consequently, we conclude that defendants have not waived this defense by failing to raise it in their answers.

III. The Despatch Oven Constitutes An Improvement To Real Estate Within the Meaning of § 5536

We now turn to the issue of whether the Despatch oven constitutes an "improvement to real proerty" within the meaning of § 5536. Initially, we note that § 5536 does

not define the term "improvement to real property." However, Pennsylvania courts, in compliance with the presumption favoring the liberal construction of statutes, 1 Pa.C.S.A. § 1928(c), have construed this language broadly to provide maximum coverage under the statute. *Fetterhoff v. Fetterhoff, supra* (elevator shaft is "improvement to real property"); *Cantanzaro v. Wasco Products, Inc., supra,* (skydome located on school roof deemed "improvement to real property"); *Mitchell v. United Elevator Co., supra* (elevator); *Keeler v. Commonwealth Department of Transporation,* 56 Pa. Commwlth. 236, 424 A.2d 614 (1981) (highway guardrails, lights, signs and direction signals). *See also Stellute v. Realty Operating Co.,* 131 P.L.J. 162 (C.P. Allegheny 1982) (revolving door); *Fromm v. Frankhouser,* 7 D&C 3d 560 (C.P. Lancaster 1977) (furnace in mobile home). Our research has disclosed no Pennsylvania decision which directly supports plaintiff's position.

Plaintiff, however, relies on *Kaczmarek v. Mesta Machine Co.,* 324 F.Supp. 298 (W.D. Pa. 1971), *aff'd on other grounds,* 463 F.2d 675 (3d Cir. 1972), which was authored by Judge Weber of this District. *Kaczmarek* involved a 50 ton crane used in steel production. The crane was attached to a steel mill and could not be removed without causing substantial damage to that structure. In holding that the crane was not an improvement to real property, Judge Weber reviewed the law of Pennsylvania in analogous areas such as fixtures, real estate assessment, and statutory construction. While we find the decision in *Kaczmarek* to be logically persuasive, we do not believe that it is consistent with the more recent Pennsylvania decisions applying § 5536. It is important to note that *Kaczmarek,* which interpreted the predecessor statute

to § 5536, was decided in 1971 and preceded all of the relevant Pennsylvania cases interpreting this statute. It follows, therefore, that *Kaczmarek* must be read in its proper context, and we are mindful of the difficult task Judge Weber faced in having to construe a newborn statute without any guidance from relevant state judicial decisions or a precise legislative history. Needless to say, our reluctance to follow *Kaczmarek* results from our conclusion that it is in direct conflict with subsequent Pennsylvania decisions.

Plaintiff also relies on *Patraka, supra*, in support of her argument that a distinct component of an entire construction project cannot by itself constitute an "improvement to real property." In that case, which, like *Kaczmarek*, was decided prior to the *Mitchell-Catanzaro* line of cases, the court stated that "[t]he phrase 'improvement to real property' generally refers to a structure or matter affixed to the realty and not each component part, such as a foundation or subbase, a plumbing or drainage system, or a roof or roadway surface." 495 F.Supp. at 1019 (footnote omitted). However, this restrictive interpretation of the term "improvement" is also at odds with the trend of cases in Pennsylvania construing § 5536 broadly and as a federal court sitting in diversity jurisdiction, we are bound to apply state law. *Erie R. Co. v. Tompkins*, 304 U.S. 64, 78, 58 S.Ct. 817, 82 L.Ed. 1188, 1194 (1941).

Further support for defendants' position exists in *Gnall v. Illinois Water Treatment Co., supra*, where Judge Conaboy of the Middle District of Pennsylvania renders a compelling analysis of § 5536. *Gnall* involved a tank which, along with other tanks, valves, piping and gauges, comprised an elaborate water treatment system at a manufacturing facility. 640 F.Supp. at 817. Relying on *Catanzaro, Mitchell* and other Pennsylvania cases, the

Court held that this "water treatment system is not merely an improvement but, rather, is a virtual necessity" to the operation of the facility. 640 F.2d at 817-18. Because § 5536 does not define the term "improvement," the *Gnall* court, like the Pennsylvania Superior Court in *Mitchell*, utilized the following definition provided by Black's Law Dictionary:

> A valuable addition made to property (usually real estate) or an amelioration in its condition, amounting to more than mere repairs or replacement, costing labor or capital, and intended to enhance its value, beauty or utility or to adapt it for new or further purposes. Generally, buildings, but may also include any permanent structure . . . .

Black's Law Dictionary 682 (5th ed. 1979). *See Mitchell*, 290 Pa. Super. at 488, 434 A.2d at 1249.

Plaintiff further argues that the oven could have been removed without damaging the structure and thus, it was not part of the realty. However, "an object need not be a fixture to be an improvement to real estate." *Gnall*, 640 F.Supp. at 818 n.3 (citing *Keeler, supra*). Moreover, under the "assembled plant doctrine" in Pennsylvania, if machinery is vital to the business operation of an industrial plant and is permanent installation therein, the machinery may properly be considered part of the real estate. *Singer v. Redevelopment Authority of City of Oil City*, 437 Pa. 55, 261 A.2d 594 (1970). In holding that the water treatment system was an "improvement to real property," the *Gnall* court rejected the plaintiff's claim that the disparate components of the system be viewed in isolation rather than together. *Id.* at 818. Moreover, the court

found that the water treatment system at issue was specifically designed to suit the particular facility involved. *Id.* at 817.

Another instructive case is *Kovach v. The Crane Company*, Nos. 82-0530-31, slip op. at 13-14 (M.D. Pa. filed May 18, 1983) where the court held that a steam boiler was an improvement to real property since it was essential to the operation of the industrial plant. Similarly, it is undisputed that the Despatch oven involved here was essential to the glass-making process and was an integral part of the Brockway plant.

Plaintiff, however, contends that the Brockway plant could function without the oven at issue and, in fact, did so immediately after the explosion. Deposition of Rick George at 64; Deposition of Gregory Allen Bushko at 34. Additionally, plaintiff contends that Brockway eventually switched to an altogether different oven system. Without commenting on the validity of those allegations, our finding that the Brockway plant was operated with ovens indicates the conclusion that the ovens, collectively and individually, were essential to the operation of the plant. *Kovach*, slip op. at 14. We reach this result because at the time of the explosion in this case, Brockway could not have conducted its operations at the Washington plant without the use of its oven system, which was an integral part of the manufacturing process. This result is consistent with analogous decisions in other states. *See J. H. Westerman Co. v. Fireman's Fund Ins.*, 499 A.2d 116, 119 (D.C. App. 1985) (installation of heating system and component switches was an improvement since it "was an integral part of the building, without which the structure could not have been used for business"); *Pacific Indemnity Co. v. Thompson-Yeager, Inc.*, 260 N.W.2d 548, 554

(Minn. 1977) (furnace); *Brown v. New Jersey Central Power & Light Co.*, 163 N.J. Super. 179, 195, 394 A.2d 397, 405 (1978) (central air conditioning system); *Yakima Fruit & Cold Storage Co. v. Central Heating & Plumbing Co.*, 81 Wash. 2d 528, 535, 503 P.2d 103, 110 (1972) (refrigeration system deemed integral part of warehouse). *But see Condit v. Lewis Refrigeration Co.*, 101 Wash. 2d 106, , 676 P.2d 466, 469 (1984) (freezer tunnel not integral; distinguishes *Yakima*).

While a determination that the oven is an improvement to real property does involve some factual considerations, we believe that the improvement at issue so clearly falls within the realm of § 5536 that there exist no material factual issues. *See Anderson v. Liberty Lobby, Inc., supra; Celotex Corp. v. Catrett, supra.* Consequently, since plaintiff has presented absolutely no evidence, by way of affidavit, deposition or otherwise, which rebuts the factual assertions of the movant-defendants, the instant dispute must be resolved as a matter of law.

Further, we note that our analysis need not consider whether the oven is a "product" for purposes of the Restatement (Second) of Torts § 402A, because we believe that § 402A and 42 Pa. C.S.A. § 5536 are not mutually exclusive. In fact, the language of § 5536 is broad enough to encompass a particular "product" under § 402A which may also be an "improvement to real property." *Cf. Abdul-Warith v. Arthur McKee and Co.*, 488 F.Supp. 306, 312 (E.D. Pa. 1980) (skip bridge of furnace deemed product under § 402A; however, "the terms structure and product are not necessarily mutually exclusive"). Thus, whether the oven or any of its parts would qualify as a § 402A product is irrelevant to our discussion.

For the foregoing reasons, we conclude that the Despatch oven is an "improvement to real property" pursuant to § 5536.

IV. Applicability of § 5536 To Designers, Manufacturers and Suppliers of Products and Component Parts

Our inquiry now turns to whether the statute of repose is applicable to all of the defendants. Obviously, § 5536 applies to Despatch, Inc., the manufacturer of the oven. *Catanzaro, supra.* On the other hand, plaintiff argues that even if Despatch is protected under § 5536, Eclipse and Honeywell are not subject to such protection since they merely marketed their parts to numerous manufacturers and did not customize their components in relation to the particular real estate or assist in the installation of the products. We disagree. Plaintiff's position was explicitly rejected by the court in *Catanzaro*, which unequivocally stated that § 5536 "extends to manufacturers who supply components which, in combination with others, become part and parcel of an 'improvement to real estate' . . . . 339 Pa. Super. at 486, 489 A.2d at 266. *See Gnall*, 640 F.2d at 820-21 (liberal construction of § 5536 extends its protection, after passage of 12 years, to any entity that has contributed to the formation of an "improvement to real property").

In *Catanzaro*, the Pennsylvania Superior Court held that the statute applies to "any person lawfully performing or furnishing the design, planning, supervision, or observation of construction, or construction of any improvement to real property." *Id.* at 486, 489 A.2d at 265. In support of its conclusion, the court cited *Leach v. Philadelphia Savings Fund Society*, 234 Pa. Super. 486, 340 A.2d 491

(1975), which noted that the statute immunizes from liability after 12 years "any" person performing one of the activities listed in the statute and emphasized how "[t]he word 'any' is generally used in the sense of 'all' or 'every' and its meaning is most comprehensive." *Id.* at 490-91, A.2d at 493. *See Gnall, supra; Mitchell, supra. But see Kovach*, slip op. at 17-18 (restrictive interpretation of § 5536; statute held inapplicable to manufacturers of products installed as improvements to real property).

Construing § 5536 liberally, as we are bound to do, we conclude that the statute applies to designers, manufacturers and suppliers of both component parts and finished products. Our result is buttressed by two recent post-*Catanzaro* decisions of the Pennsylvania Superior Court. In *Goodrich v. Luzerne Apparel Manufacturing Corp.*, 356 Pa. Super. 148, 514 A.2d 188 (1986) the court concluded that a testing laboratory's approval of the design of an electrical panel board was equivalent to designing the panel board for purposes of the statute of repose. Likewise, in *Fetterhoff, supra*, the court held that a designer-installer of an elevator, who periodically performed maintenance and repair work thereon, was afforded the protection of § 5536. 354 Pa. Super. at 357, 512 A.2d at 33. Based on the broad construction of the language of § 5536 Pennsylvania courts, we conclude that all three defendants in the case are afforded that statute's protection.

V. Prognostication of Result in the Pennsylvania Supreme Court

Like the Court in *Gnall*, we are obliged to predict whether the Pennsylvania Supreme Court will ultimately adopt the rationale of *Catanzaro* and its progeny. We are well aware that the Court of Appeals for the Third Circuit

has cautioned its district courts that sweeping changes in "basis tort law," such as that before us here, should stem from the Pennsylvania Supreme Court and not the Superior Court. *Vargas v. Pitman Manufacturing Co.*, 675 F.2d 73, 76 (1982); *Keystone Aeronautics Corp. v. R.J. Ernstrom Corp.*, 499 F.2d 146, 147 (3d Cir. 1974). However, after having extensively researched this issue, we conclude that the Pennsylvania Supreme Court would follow *Catanzaro* since the emerging trend in Pennsylvania has been to apply § 5536 broadly. As Judge Conaboy aptly stated in the *Gnall* case:

> Regarding the logic of the *Catanzaro* decision, we see it as a logical progression from the principles expressed in *Leach* and *Mitchell* and the most recent example of a trend in Pennsylvania's courts to liberally construe the Statute of Repose to extend its protection after passage of 12 years, to any entity that has contributed to the formation of an "improvement to real estate." We are struck by the unequivocal aspect of the *Catanzaro* decision and we now predict that *Catanzaro* and not *Kovach* renders the interpretation of the Statute of Repose more likely to be adopted by the Pennsylvania Supreme Court. We believe this to be a logical prediction stemming from our responsibility, in the absence of a decision of the Pennsylvania Supreme Court, to " . . . consider relevant state precedents, analogous decisions, considered dicta, scholarly works, and any other reliable data tending convincingly to show how the highest court in the state would decide the issue at hand." (emphasis ours). *See McKenna v. Ortho Pharmaceutical Corp.*, 622 F.2d 657, 663 (3d Cir. 1980).

Id. at 821 (footnote omitted).

Accordingly, since plaintiff has presented no evidence by way of affidavit or otherwise, which raises a genuine issue of material fact, summary judgment will be entered in favor of the defendants.

An appropriate order follows.

/s/ MAURICE B. COHILL, JR.
Chief Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

BETTY JANE LUZZADER,
Executrix of the Estate of
David P. Luzzader, Deceased,
Plaintiff,
v.
DESPATCH OVEN COMPANY
and ECLIPSE, INC.,
Defendants,
v.
HONEYWELL, INC.,
Third-Party Defendant.

Civil Action
No. 81-2145

ORDER

AND NOW, to-wit, this 30th day of December, 1986, for the reasons stated in the foregoing opinion, it is hereby ORDERED, ADJUDGED AND DECREED that defendants' motion for summary judgment be and hereby is GRANTED as to all defendants.

/s/ MAURICE B. COHILL, JR.
Chief Judge

cc:

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United States Court Of Appeals

FOR THE THIRD CIRCUIT

Nos. 87-3030 & 87-3142

BETTY JANE LUZZADER, Executrix of the Estate of David P. Luzzader, Deceased

vs.

DESPATCH OVEN COMPANY and ECLIPSE, INC.

vs.

BROCKWAY, INC., a corporation; HONEYWELL, INC.
Betty Jane Luzzader, *Appellant*

(D.C. Civil No. 81-2145)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA—PITTSBURGH

Present: SLOVITER, STAPLETON, *Circuit Judges* and BROTMAN, *District Judge**

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Western District of Pennsylvania—Pittsburgh and was argued by counsel September 10, 1987.

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*Honorable Stanley S. Brotman, U.S. District Judge for the District of New Jersey, sitting by designation.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court entered December 30, 1986, and appealed at No. 87-3030, be, and the same is hereby reversed. It is further ordered and adjudged that the judgment of the said District Court entered February 10, 1987 and appealed at No. 87-3142, be, and the same is hereby affirmed. Costs taxed against the appellees in appeal No. 87-3030 and against the appellant in appeal No. 87-3142.

ATTEST:

/s/ M. ELIZABETH FERGUSON

Chief Deputy Clerk

November 27, 1987

Nos. 87-3030 & 87-3142

Certified as a true copy and issued in lieu of a formal mandate on January 26, 1988.

Test: /s/ M. ELIZABETH FERGUSON
Chief Deputy Clerk,
U.S. Court of Appeals for the Third Circuit

Costs taxed in favor of Honeywell, Appellee in 87-3142 as follows:

Brief	$30.60

Costs taxed in favor of Betty Jane Luzzader, Appellant in 87-3030 as follows:

Docketing Fee	$ 65.00
Appendix	80.80
Brief	46.54
TOTAL	$192.34

IN THE

United States Court of Appeals

FOR THE THIRD CIRCUIT

Nos. 87-3030 and 87-3142

BETTY JANE LUZADDER, Executrix of the Estate of David P. Luzadder, Deceased,

Appellant,

v.

DESPATCH OVEN COMPANY, ECLIPSE, INC., and HONEYWELL, INC.,

Appellees.

PETITION FOR REHEARING

APPEALS FROM THE JUDGMENT AND ORDERS OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA, AT CIVIL ACTION NO. 81-2145.

MEYER, DARRAGH, BUCKLER, BEBENEK & ECK
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LOUIS B. LOUGHREN, ESQUIRE
LOUIS C. LONG, ESQUIRE
Counsel for Appellee
HONEYWELL, INC.

PETITION FOR REHEARING

AND NOW, comes HONEYWELL, INC., one of the appellees, and hereby moves this Honorable Court, pursuant to Fed.R.App.P. 40 and Chapter VIII of the Internal Operating Procedures of the United States Court of Appeals for the Third Circuit, for rehearing, and in support thereof it states as follows:

I. STATEMENT OF COUNSEL

I express a belief, based on a reasoned and studied professional judgment, that this appeal involves questions of exceptional importance: (1) the applicability of Pennsylvania's twelve-year statute of repose, 42 Pa.C.S.A. § 5536, to manufacturers component parts integrated into an improvement to real property; and (2) the degree of deference to be afforded by this Court to Pennsylvania Superior Court decisions. Although the statute of repose issue has divided the Pennsylvania district courts, the Pennsylvania Superior Court has, on two occasions, ruled that the statute is indeed applicable to such a class of potential defendants. The panel majority is contrary to *Catanzaro v. Wasco Products, Inc.*, 339 Pa. Superior Ct. 481, 489 A.2d 262 (1985); and *Mitchell v. United Elevator Co.*, 290 Pa. Superior Ct. 476, 434 A.2d 1243 (1981), and consideration by the full court is necessary to secure and maintain uniformity of decisions on this issue. Moreover, consideration by the full court is necessary and appropriate because the panel's unabashed disregard of Superior Court cases—which would be binding authority in the state courts—raises important systemic questions of constitutional dimension.

II. STATEMENT OF THE CASE

This products liability case arises from a December 2, 1980 explosion of a large, gas-fired furnace used in a glass molding operation. The oven was sold and installed in March of 1965. It allegedly contained component parts manufactured by Eclipse, Inc. and Honeywell, Inc. The component part manufacturers raised, as an affirmative defense, Pennsylvania's twelve-year statute of repose for improvements to real property, 42 Pa.C.S.A. § 5536. The defendants and the third-party defendant presented this issue via a joint motion for summary judgment. Following the Superior Court's lead, the District Court granted summary judgment, concluding that the statute of repose indeed applied to manufacturers of component parts for large industrial equipment. *Luzzader v. Despatch Oven Co.*, 651 F. Supp. 239 (W.D. Pa. 1986). A divided panel reversed, however, concluding that manufacturers have been excluded from the protection of the statute of repose and that it was not bound to follow the prior intermediate appellate court decisions. (Slip op. at 10). A copy of the panel decision is attached to this petition.

III. POINTS OF LAW OVERLOOKED OR MISAPPREHENDED

A. The panel majority denigrated the only Pennsylvania appellate precedent on the subject, the Superior Court's decisions in *Catanzaro v. Wasco Products, Inc.*, 339 Pa. Superior Ct. 481, 489 A.2d 262 (1985); and *Mitchell v. United Elevator Co.*, 290 Pa. Superior Ct. 476, 434 A.2d 1243 (1981).

B. The panel majority's failure to follow state court decisions which should be afforded full faith and

credit renders the choice of forum determinative of the outcome of this case, contrary to the spirit of *Erie Railroad Co. v. Tompkins,* 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938).

C. The panel majority misapprehended the purpose of the statute of repose—to bar stale claims regardless of the theory of liability pled—in holding that the statute of repose should not be applied to manufacturers of component parts.

IV. ARGUMENT

A. Rehearing Should Be Allowed Because The Divided Panel's Decision Creates A Conflict Between The Law Of The Circuit And The Law Of Pennsylvania And, Thus, The Choice Of Forum Determines The Outcome Of Cases Involving The Statute Of Repose.

The panel majority is squarely at odds with the only Pennsylvania precedents on the issue. In *Catanzaro,* 339 Pa. Superior Ct. at 486-87, 489 A.2d at 265; and *Mitchell,* 290 Pa. Superior Ct. at 488, 434 A.2d at 1249, the Superior Court unequivocally and unanimously applied the statute of repose to manufacturers of component parts. *See also Facenda v. Applied Powers, Inc.,* No. 87-0980 (E.D. Pa. July 17, 1987); *Gnall v. Illinois Water Treatment Co.,* 640 F. Supp. 815 (M.D. Pa. 1986). *Contra Vasquez v. Whiting Corp.,* 660 F. Supp. 685 (E.D. Pa. 1987); *Springman v. Wire Machinery Corp. of America,* 666 F. Supp. 66 (M.D. Pa. 1987); *Kovach v. Crane Co.,* No. 82-0530 (M.D. Pa. May 18, 1983). As a result, the choice of forum will be determinative of the outcome of this case, contrary to the spirit of *Erie Railroad Co. v. Tompkins,* 304 U.S. 64, 58 S. Ct. 817, 82 L.Ed. 1188 (1938).

The federal courts ought to follow Superior Court decisions. Because the Pennsylvania Supreme Court is now a certiorari court, 42 Pa.C.S.A. § 726, the Superior Court has, for all intents and purposes, become a court of last resort. Pennsylvania trial judges are bound by its decisions and its decisions would be given full faith and credit in any sister state, U.S. Const., article IV, section 1; 28 U.S.C. § 1738. Yet, the federal courts, when purporting to apply state law, may freely disregard any Superior Court decision. While the role of a federal judge, under *Erie,* is to predict what the state's highest court would hold on a given issue, the rule was intended to prevent situations in which the choice of forum would determine the outcome of a case. However, by giving the federal judiciary the power to ignore a decision binding in every state court in the union, an opposite result occurs.

While the panel majority followed the letter of *Erie,* it disregarded or ignored its spirit. There is no doubt that a Pennsylvania trial judge and any subsequent Pennsylvania Superior Court panel would be constrained to follow *Catanzaro* and *Mitchell.* Yet, a federal judge would be inclined to follow—if not be bound by—this panel's decision. Moreover, any subsequent panel of this Court would also be bound by this panel majority irrespective of strong precedents from the state intermediate appellate court. Internal Operating Procedure VIII. C. While intermediate appellate decisions are not binding authority, they are, nevertheless, presumptive evidence of state law and should not be disregarded or emasculated absent weighty and demonstrable considerations. *National Surety Corp. v Midland Bank,* 551 F.2d 12 (3d Cir. 1977). The panel majority sets forth no compelling reason to reach a contrary conclusion to that expressed by the Superior

Court. A federal court's unsubstantiated disregard of a decision which would be binding in the state courts fosters anomalous results which occur *solely* because of the choice of forum. Such a result was not intended by the full-faith and credit clause nor by *Erie* and its progeny.

B. Rehearing Should Be Granted Because The Panel Majority Misapprehended The Purpose Of The Statute Of Repose.

The panel majority perceived the application of the statute of repose to manufacturers of component parts to be at variance with the purposes of strict products liability. (Slip op. at 10-12). *See also Vasquez,* 660 F. Supp. at 689. However, this result-oriented approach places undue emphasis upon the status of the defendant and plaintiff's choice of liability theories and ignores the purpose of the statute of repose. The statute is designed to bar stale claims, *regardless* of the theory of liability pursued. Just as a statute of limitations defense would bar a claim sounding under the Restatement (Second) of Torts, 402A (1965), so too can the statute of repose bar such a claim. An untimely complaint should be dismissed, no matter what theory was pled. Section 5536 is not limited to negligence claims nor is it applicable solely to architects. Instead, it applies to persons engaged in the supply of goods or services incidental to the construction of an improvement to real property. *See, e.g., Catanzaro, supra.* Here, defendants allegedly supplied component parts integrated into a large industrial furnace. As such, they should be afforded the protection of the statute of repose.

V. CONCLUSION

Because the panel majority declined to follow state court precedent and because it gave undue emphasis to the theory espoused by the complaint, rehearing by the court in banc is warranted. This novel and controversial issue should not be resolved by a divided panel in a manner inconsistent with the settled pronouncements of the Pennsylvania intermediate appellate court. Therefore, the application for rehearing should be granted and the judgment of the district court should be affirmed.

Respectfully submitted,

MEYER, DARRAGH,
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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing document have been served upon the persons and in the manner indicated below:

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United States Court Of Appeals

FOR THE THIRD CIRCUIT

Nos. 87-3030, 87-3142

BETTY JANE LUZZADER, Executrix of the Estate of David P. Luzzader, Deceased

v.

DESPATCH OVEN COMPANY and ECLIPSE INC.

v.

BROCKWAY, INC., a corporation; HONEYWELL, INC.
Betty Jane Luzzader, *Appellant*

Sur Petition for Rehearing

Present: GIBBONS, *Chief Judge,* SEITZ, WEIS, HIGGINBOTHAM, SLOVITER, BECKER, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, SCIRICA, and COWEN, *Circuit Judges,* and BROTMAN, *District Judge**

The petition for rehearing filed by

Appellee, HONEYWELL, INC.

in the above-entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit

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*Hon. Stanley S. Brotman, United States District Judge for the District of New Jersey, sitting by designation.

judges-of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

/s/ DOLORES K. SLOVITER
Judge

Dated: December 18, 1987

TEXT OF CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. U.S. Const., art. 4, section 1:

> **Section 1.** Full Faith and Credit shall be given in each State to the public Acts, Records, and Judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

2. U.S. Const., amendment X:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

3. 28 U.S.C. 1652:

> **State laws as rules of decision**
>
> The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.

4. 28 U.S.C. 1738:

> **State and Territorial statutes and judicial proceedings; full faith and credit**
>
> The Acts of the legislature of any State, Territory, or Possession of the United States, or copies thereof, shall be authenticated by affixing the seal of such State, Territory or Possession thereto.
>
> The records and judicial proceedings of any court of any such State, Territory or Possession, or copies

thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.

Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

5. 42 Pa.C.S.A. § 726:

Extraordinary jurisdiction

Notwithstanding any other provision of law, the Supreme Court may, on its own motion or upon petition of any party, in any matter pending before any court or district justice of this Commonwealth involving an issue of immediate public importance, assume plenary jurisdiction of such matter at any stage thereof and enter a final order or otherwise cause right and justice to be done.

6. 42 Pa.C.S.A. § 742:

Appeals from courts of common pleas

The Superior Court shall have exclusive appellate jurisdiction of all appeals from final orders of the courts of common pleas, regardless of the nature of the controversy or the amount involved, except such classes of appeals as are by any provision of this chapter within the exclusive jurisdiction of the Supreme Court or the Commonwealth Court.

7. 42 Pa.C.S.A. § 5536:

Construction projects

(a) General rule.—Except as provided in subsection (b), a civil action or proceeding brought against any person lawfully performing or furnishing the design, planning, supervision or observation of construction, or construction of any improvement to real property must be commenced within 12 years after completion of construction of such improvement to recover damages for:

(1) Any deficiency in the design, planning, supervision or observation of construction or construction of the improvement.

(2) Injury to property, real or personal, arising out of any such deficiency.

(3) Injury to the person or for wrongful death arising out of any such deficiency.

(4) Contribution or indemnity for damages sustained on account of any injury mentioned in paragraph (2) or (3).

(b) Exceptions.—

(1) If an injury or wrongful death shall occur more than ten and within 12 years after completion of the improvement a civil action or proceeding within the scope of subsection (a) may be commenced within the time otherwise limited by this subchapter, but not later than 14 years after completion of construction of such improvement.

(2) The limitation prescribed by subsection (a) shall not be asserted by way of defense by any person in actual possession or control, as owner, tenant or otherwise, of such an improvement at

the time any deficiency in such an improvement constitutes the proximate cause of the injury or wrongful death for which it is proposed to commence an action or proceeding.

(c) No extension of limitations.—This section shall not extend the period within which any civil action or proceeding may be commenced under any provision of law.